



HRJust WP 3
Deliverable 3.2

Completed Theory of States' HRJs, addressing legitimacy, transparency and State accountability, including Typology and Evaluation of Human Rights Justifications, submitted for publication (CUP for consideration)

by
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Abstract	<p>This Deliverable presents an analysis of the defining features of human rights justifications (HRJs), explores when HRJs are likely to constitute a misuse of human rights terminology, and clarifies their institutional implications. It begins by examining cases of HRJs drawn from Taiwan's State reports under UN human rights review processes and breaks down their argumentative structure based on Hohfeld's rights analysis. This approach enables the development of a typology of HRJs (Types A, B, and C), on the basis of which a normative appraisal can be conducted.</p> <p>Grounded in this typology, the deliverable argues that HRJs are most legally intriguing when governmental human rights assertions, used to defend policy, give rise to apparent conflicts between negative and positive human rights. These situations are problematic because they signal heightened institutional barriers to the implementation of human rights, indicating governmental attempts to evade their core duty to uphold such rights by generating avoidable conflicts and undermining judicial review. Most importantly, the typology of HRJs exposes a notable phenomenon that is rarely addressed in the existing literature on human rights conflicts: intrapersonal HRJs. This serves as a strong indicator that a marginalised group may be subject to discrimination. At this juncture, the theoretical framework developed in this Deliverable,</p>



	<p>together with Deliverable 7.5 - which comprises 7.5-A Rings on Water) and 7.5-B (intersectionality) - constitutes a cycle of knowledge co-production.</p> <p>In line with the Grant Agreement, a book proposal for the anthology was submitted to CUP on the 26th of April, via email to Tobias Ginsberg (see Annex B). This theory has been informed by an interdisciplinary collaboration between law, political theory and philosophy.</p>
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Typology and Evaluation of Human Rights Justifications

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1. Introduction

The phenomenon of Human Rights Justifications (HRJs) arises when the State deploys the language of human rights to justify its actions or inaction. This Deliverable seeks to present an analysis of the defining features of HRJs, to explore when HRJs are likely to constitute a misuse of human rights terms, and to clarify their institutional implications.

The Deliverable argues that HRJs give rise to human rights conflicts which are of special concern to lawyers. Conflicts between human rights are hardly a new challenge. They have become increasingly prevalent as the catalogue of human rights has expanded, the positive dimension of State human rights obligations has developed, and the horizontal effect of human rights has gained recognition. HRJs, however, typically involve a distinct dynamic: the government actively elevates certain public and private interests to the status of rights and frames public debate over substantive issues as conflicts between competing rights claims. In doing so, it is sometimes the appearance of conflict itself that performs the persuasive work, rather than the actual content or scope of the asserted rights. When misused, HRJs can, at the institutional level, undermine the coherence of the human rights system and hollow out the accountability entrusted to the political branches.

The methodology of this paper is primarily analytical. Human rights are treated not as a moral concept but as a legal notion grounded in doctrinal foundations, with the practical development of human rights under the United Nations system and the jurisprudence of the European Court of Human Rights (ECtHR) serving as the normative backdrop. To concretise the features of HRJs, the paper draws on Taiwan's State human rights reports. However, it does not aim to examine HRJs in any specific country or to evaluate particular controversies that give rise to HRJs. Rather, it seeks to identify features that are generally applicable across a range of jurisdictions, thereby enhancing broader understanding of the phenomenon.

The paper is structured in two sections. It begins by presenting a typology of HRJs based on the findings of WP5 (Migration) (Section 2). This typology identifies the defining features of HRJs as they manifest in an actual liberal democratic society (in this case, Taiwan). In this respect, the typology demonstrates why HRJs constitute a distinct phenomenon and ensures that the subsequent analysis is grounded in empirical cases rather than mere speculation. The typology reveals that the structure of HRJs is fundamentally one of human rights conflict. The paper then proceeds to examine the normative and institutional implications of human rights conflicts when they are induced by the government's use of human rights claims (Section 3).

In line with the Grant Agreement, a book proposal for the anthology was submitted to Cambridge University Press on the 26th of April, via email to Tobias Ginsberg tobias.ginsberg@cambridge.org, (see Annex B). This theory has been informed by an interdisciplinary collaboration between law, political theory and philosophy.



2. A Typology of Human Rights Justifications (HRJs)

HRJs refer to the government’s defence of a policy framed in human rights terms, which can generate conflicts between rights. However, conflicts between interests, policies, or goals are pervasive in everyday politics, where competing claims frequently collide. This Project therefore needs a more refined framework to differentiate among types of rights conflicts in order to identify the particular difficulties that arise under HRJs.

I develop such a framework on the basis of observations drawn from Taiwan’s State reports under the UN human rights conventions, as analysed by Team Taiwan of WP5.¹ Since 2009, Taiwan has domesticated UN human rights instruments and has conducted periodic reviews of State human rights reports under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD), and the Convention on the Rights of the Child (CRC). These reviews include criticisms of rights infringements and the government’s responses to allegations of rights violations raised by Civil Society actors or review committees. As these reviews are understood to be exchanges concerning human rights performance, the government’s defences naturally invoke rights-based language and therefore provide a useful basis for identifying distinct patterns of HRJ rhetoric. While these patterns may not exhaust all possible forms of HRJs, they vividly illustrate the challenges that judicial review would face should any such disputes be brought before a court.

I categorise HRJs rhetoric by drawing two distinctions. First, what kinds of rights are in conflict—positive or negative rights? Second, whose rights are in conflict—those of different individuals or those of the same individual? These distinctions are illustrated in Table 1 below. Definition and real-world examples of each type follow.

Gov’s Defence Claimant’s Claim	Positive rights		Negative rights	
Negative Rights	Type A			
	Interpersonal conflict	Intrapersonal conflict		
Positive Rights			Type B	

¹ This section builds on the examples and categories of HRJs set out in the WP5 Memorandum: Ya-Wen Yang, *HRJ Typology*, at 4–6 (23 Nov 2025) and further elaborates on the theoretical implications underlying this typology.



		Interpersonal conflict	Intrapersonal conflict
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Table 1: Types of Right Conflicts

Here, as Wesley Hohfeld's rights analysis suggests, each right has a correlated obligation.² A claimant's negative right entails a corresponding negative obligation on the part of the government, while a positive right entails a corresponding positive obligation. A negative human rights obligation refers to the government's duty to respect rights, whereas a positive human rights obligation refers to the government's duty to protect or to fulfil them.³ Following the standard understanding in international human rights law, the obligation to respect requires the State to refrain from illegitimate interference with right-holders' exercise of their rights. The obligation to protect requires the State to prevent interference by third parties (non-state actors) with the exercise of those rights. Finally, the obligation to fulfil refers to the State's duty to adopt appropriate measures to realise and ensure the effective enjoyment of right-holders' rights.⁴

- **Type A HRJs:** A **State action** allegedly violating a negative obligation to respect X right is defended by invoking a positive obligation to protect or fulfil Y right.
- **Type B HRJs:** A **State inaction** allegedly violating a positive obligation to protect or fulfil X right is defended by invoking a negative obligation to respect Y right.

In a Type A HRJ scenario, the government defends an action by invoking a human rights obligation to act; by contrast, in a Type B HRJ scenario, the government defends an omission by invoking a human rights obligation not to act. In both Type A and Type B HRJ scenarios, a further subdivision can be drawn between **interpersonal conflicts** (where conflicts arise between the rights of different right-holders) and **intrapersonal conflicts** (where conflicts arise between different rights held by a single right-holder).

Examples of Type A and Type B HRJs

Before turning to concrete examples of HRJs, it is necessary to clarify at the outset that the language used in the State reports, given that they are not judicial decisions, may lack precision. In particular, ambiguity often arises as to whether a defence is best understood as invoking a right or merely an interest. For example, suppose a free vaccine is provided to all. This measure may be described as a benefit that promotes recipients' health, but it may also be framed as realising their right to health. For the purposes of this project, the former constitutes a non-HRJ

² MATTHEW H. KRAMER, RIGHTS AND RIGHT-HOLDING: A PHILOSOPHICAL INVESTIGATION 16 (2024).

³ United Nations Commission on Human Rights, Economic and Social Council, Special Rapporteur Asbjørn Eide, *Report on the Right to Adequate Food as a Human Right*, ¶ 66, U.N. Doc. E/CN.4/Sub.2/1987/23 (7 July 1987).

⁴ Manfred Nowak, *Respect-Protect-Fulfil*, 4 in ELGAR ENCYCLOPEDIA OF HUMAN RIGHTS 162, 163 (Christina Binder et al. eds., 2022).



justification, whereas the latter constitutes an HRJ. However, when governments loosely argue that a measure is adopted ‘for the good of people’s health’, it is often unclear which of these arguments is intended (whether the measure is framed as conferring a benefit or as fulfilling a right) and whether the distinction is even consciously recognised.

Similar ambiguities arise in many of the examples discussed below. In such cases, I tend to categorise the justifications as asserting an HRJ rather than as non-HRJ. This approach inevitably invites the concern that the language may be stretched to fit my analytical model. The purpose of identifying HRJs in State human rights reports, however, is not to criticise their rhetorical form. Rather, it is to probe the distinction between non-HRJ and HRJs, and to reflect on the theoretical implications that arise when defences against criticism are framed in HRJs expressions. To grasp these implications, I proceed on the assumption that governments intend to invoke HRJs, and then I ask why that matters—specifically, what difference the use of HRJs makes.

It is also important to note that WP 4’s research on COVID-19 reports that this ambiguity between rights and interests is pervasive in governmental justifications of COVID-19 measures, while research on Climate WP 6 observes that rights-based language is often avoided by governments in climate litigation. Both the vagueness identified in WP 4 and the avoidance of rights language noted in WP 6 are themselves meaningful phenomena. Their significance, however, can only be more clearly understood once we have a firmer grasp of the analytical difference that HRJs make.

The following illustrates Types A and B HRJs in turn. Recall that Type A concerns government action, whereas Type B concerns government inaction. Both types involve conflicts between negative and positive rights, and such conflicts may arise either between the rights of different right-holders (interpersonal conflicts) or between different rights held by the same individual or group (intrapersonal conflicts). It will be argued that HRJ involving intrapersonal conflicts poses the greatest challenges in both moral and judicial terms.

Type A HRJs, Example 1: Interpersonal Conflict Arising from Government Action

Migrant workers in Taiwan are not permitted to change employers unilaterally. When this restriction was questioned in Taiwan’s First State Report under the ICCPR, the government argued that limitations on migrant workers’ job mobility were necessary to safeguard nationals’ right to work and to maintain social stability.⁵ In this account, the restriction on migrant workers’ negative liberty to work is justified as the fulfilment of a positive duty to protect nationals’ right to

⁵ Nat’l Human Rights Comm’n, Control Yuan, Int’l Covenant on Civil & Political Rights: List of Issues to Be Taken Up in Connection with the Consideration of the Initial Report of Republic of China (Taiwan): Replies of Republic of China (Taiwan) to the List of Issues 99 (2013), <https://www.humanrights.moj.gov.tw/media/12447/655200414181286683.pdf>.



work. This therefore constitutes a Type A HRJ, in which the conflict arises between the negative and positive rights of competing rights-holders (i.e., an interpersonal conflict).

Type A HRJs, Example 2: Intrapersonal Conflict Arising from Government Action

Marriage immigrants are required to undergo an interview when applying for a visa. The interview may become intrusive to privacy if visa officers request details of intimate relationships in order to prevent sham marriages. However, this review, despite its potential infringement of the right to privacy, is said to facilitate (female) marriage migrants' right to family reunion.⁶ This defence therefore constitutes a Type A HRJ involving an intrapersonal rights conflict, in which marriage immigrants' positive right to family reunification is set against their negative right to privacy.

Another example, albeit one with more ambiguous language, is Taiwan's now-invalidated ban on female workers' night shifts.⁷ The government justified the ban by invoking the need to protect female workers' health and 'maternity'. If 'protecting health' is understood as protecting female workers' right to health, this case likewise constitutes a Type A HRJ involving an intrapersonal rights conflict. The government seeks to justify a violation of female workers' negative right to work by reference to the fulfilment of their positive right to health.

It is noteworthy that both examples exhibit a strong patriarchal tendency. I therefore label Type A HRJs involving intrapersonal conflict as **a patriarchal use** of HRJs. It is perhaps not entirely coincidental that both cases involve women as the claimants. This rhetoric obscures the claimants' status, transforming them from victims of human rights violations into beneficiaries.

Type B HRJs, Example 1: Inter-personal Conflict Arising from Government Inaction

I do not find a real-life example of this type in Taiwan's State reports under the UN human rights conventions. However, a hypothetical case may be instructive. Taiwan does not criminalise racial or sexual hate speech. Suppose that individuals affected by such speech argue that their positive right to equal protection is violated by the State's failure to enact legislation prohibiting racial hate speech. The government, in turn, might defend the absence of a hate-speech ban by arguing that such inaction is necessary to respect the speaker's freedom of expression. In this scenario, the

⁶ Foundation of Women's Rights Promotion and Development, CEDAW-Initial Report of Republic of China (Taiwan) 142–43 (2009), <https://gec.ey.gov.tw/File/8A122CDA78EEE928/4980b92c-a2ec-4824-b03e-6f181a9a5813?A=C> . ; Ministry of Justice, Implementation of the International Covenant on Civil and Political Rights: Third Report Submitted under Article 40 of the Covenant 100–01 (2020), <https://www.humanrights.moj.gov.tw/media/14805/02%E8%8B%B1%E6%96%87%E7%89%88-implementation-of-the-international-covenant-on-civil-and-political-rights.pdf?mediaDL=true> .

⁷ Article 49, paragraph 1, of the Labour Standards Act prohibited employers from requiring female workers to work between 10:00 p.m. and 6:00 a.m. the following morning. In J.Y. Interpretation No. 807 (2021), the Constitutional Court invalidated this provision on the ground that it constituted sex discrimination. The decision is available at: <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310988>.



alleged violation of the minority's positive right to racial equality is defended by reference to the speaker's negative right to freedom of expression.

Type B HRJs, Example 2: Intra-personal Conflict Arising from Government Inaction

An illustrative case appears in Taiwan's CEDAW Third Report, where the government was questioned about the absence of comprehensive labour protections for domestic workers and the delay in adopting a Domestic Workers Protection Act. In response, the State argued that existing frameworks, such as the Employment Service Law and written employment contracts, already provided sufficient protection, and that any further measures would need to balance employers' and employees' freedom of contract.⁸ In this scenario, claimants ask the government to meet its positive obligation to protect domestic workers' rights at work, yet the government relies on a non-interventionist, negative-duty interpretation of the very same right held by the same right holders.

To the extent that the government invokes negative rights as a justification for inaction, this rhetoric can be labelled a **neoliberal use** of HRJs. To be clear, this rhetoric is also patriarchal insofar as it suggests that the government knows better than the claimant that inaction serves the claimant's interests more effectively than the action requested by the claimant. It is labelled 'neoliberal' here, however, because the rhetoric presumes State intervention itself to be the principal source of rights infringement, and this presumption is then deployed as a justification for inaction.

Summary of Type A and Type B: Conflicts of Negative and Positive Obligations

Before proceeding to other types of HRJs, I would like to note that Types A and B are central to this typology because they generate conflicts between negative and positive obligations. This feature warrants particular theoretical attention, as such conflicts may complicate the determination of the appropriate standard of judicial review.

The level and structure of judicial scrutiny applied by domestic and supranational human rights courts are typically influenced by whether a case concerns negative or positive rights. As a general, and admittedly oversimplified, matter, courts are more institutionally effective when assessing alleged violations of negative rights or obligations than when adjudicating claims involving positive ones. Negative obligations require the State to 'refrain from interference' and generally raise issues that courts are better equipped to assess, in particular through the application of the principle of proportionality. Accordingly, alleged breaches of negative obligations tend to attract stricter judicial scrutiny, especially where the essence of a fundamental right is at stake.

⁸ Executive Yuan, Replies from Republic of China (Taiwan) to the List of Issues to be taken up in Connection with the Consideration of its Third Report on the Elimination of All Forms of Discrimination Against Women (CEDAW) 77–78 (2018), <https://gec.ey.gov.tw/File/7741924593E9C77C?A=C> .



Positive obligations, by contrast, require the State to take action to secure the effective enjoyment of human rights. Even where courts recognise the existence of a positive obligation (for example, an obligation to protect individuals from the adverse impacts of climate change or a pandemic in the first place), claims of this kind typically attract a lower intensity of review. This is because their fulfilment often involves complex policy choices and the allocation of public resources, matters in respect of which courts acknowledge their limited institutional competence. The practical variability and complexity of positive obligations therefore often necessitate the use of a wider range of evaluative techniques, including procedural review⁹ and assessments of non-regressiveness.¹⁰ Supranational and domestic courts therefore tend to accord a wide margin of appreciation to the State in such cases.

The foregoing is not to suggest that the judiciary is incapable of dealing with conflicts between positive and negative obligations. Rather, the point is that Types A and B reflect the typical situations in which human rights tend to collide—namely, the co-existence of positive and negative obligations—and the consequent challenges that such collisions pose for judicial decision-making. Section 3 below will further analyse the normative implications of such conflicts.

Type C: Competing for Resources

I now turn to a third type of HRJs and to a non-HRJ for purposes of comparison. These involve broader disputes over how resources are best allocated to realise positive rights.

- **Type C:** A State inaction allegedly violating a positive obligation to protect or fulfil X right is defended by invoking a positive obligation to fulfil other people's X right.
- **Non-HRJ:** A State inaction allegedly violating a positive obligation to protect or fulfil X right is defended by asserting that the obligation has already been fulfilled through other measures.

Type C HRJs, like Type B, concern governmental defences of inaction. Type C involves the allocation of resources among competing claimants: the government provides resources to some right-holders but not to others. Accordingly, the government justifies the rejection by referring to the positive human rights of those who benefit. It can thus be seen as a conflict between two positive obligations owed to different right-holders. However, some commentators do not consider the distribution of resources to constitute a human rights conflict.¹¹

⁹ Janneke Gerards, *Procedural Review by the ECtHR: A Typology*, in *PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES* 127, 130–40 (Eva Brems & Janneke Gerards eds., 2017).

¹⁰ Ben T C Warwick, *Concepts of Non-Retrogression in Economic and Social Rights*, 47 *HUM. RIGHTS Q.* 115, 121–34 (2025).

¹¹ E.g., Lorenzo Zucca, *Conflicts of Fundamental Rights as Constitutional Dilemmas*, in *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS* 19 (Eva Brems ed., 2008).



Finally, in the case of non-HRJ, the government acknowledges the existence of a positive obligation to protect or fulfil a claimant's right but argues that this obligation has already been satisfied through alternative measures, rather than those sought by the claimant. This situation does not involve conflicts of rights. It is not a HRJ because the government does not invoke other human rights obligations to justify inaction but rather argues that the claimant's positive rights have been realised insofar as alternative measures have been taken. It is included here for comparison with other HRJ scenarios because such cases are very common and consume significant Civil Society resources to monitor. Central to the difficulty in these cases is the uncertainty surrounding the justiciability of positive human rights and obligations.

Type C HRJs example

Unemployed temporary migrant workers in Taiwan have no access to vocational training that is available to nationals. When this disparity is challenged in the second review of state report under ICESCR, the government defends the restrictive measure by arguing that the resources are reserved for nationals.¹² In other words, not fulfilling foreign workers' positive right to work is justified as a means of realising nationals' positive right to work, thereby avoiding a 'squeezed-out' effect.

Non-HRJ example

In Taiwan's ICESCR Second Report, the government was asked whether a comprehensive anti-discrimination law exists, covering all grounds of discrimination.¹³ The government admitted that no such legislation is in place, but maintained that Taiwan has actively incorporated UN human rights conventions into domestic law, which it claims is sufficient to address all forms of discrimination. In this scenario, the government does not deny the existence of a positive duty to protect individuals from discrimination, yet it defends the absence of comprehensive equality legislation by invoking other measures—often lesser, indirect, or even irrelevant ones.

¹² Ministry of Justice, Replies from Republic of China (Taiwan) to the List of Issues to be taken up in Connection with the Consideration of its Second Report 69-71 (2016), <https://www.humanrights.moj.gov.tw/media/12287/3672004141439b6645.pdf?mediaDL=true>.

¹³ Nat'l Human Rights Comm'n, Control Yuan, Replies from Republic of China (Taiwan) to the List of Issues to Be Taken Up in Connection with the Consideration of Its Second Report 13-14 (2016), <https://www.humanrights.moj.gov.tw/media/12287/3672004141439b6645.pdf>.



3. Human Rights Justification as Human Rights Conflict

3.1 Interpersonal Conflicts

The categorisation above suggests that the argumentative structure of HRJs very frequently takes the form of **human rights conflicts**, especially conflicts between positive and negative rights, as well as the corresponding obligations owed under those rights. Simply put, HRJs lead to human rights conflicts. Accordingly, my initial questions—'When and why are HRJs problematic?'—can be more precisely reformulated as follows: when and why are purposefully constructed human rights conflicts normatively problematic? What are the costs, if any, of a government's defence to an alleged human rights infringement that leads to the proliferation of human rights conflicts?

Three Approaches to Human Rights Conflicts

To assess the questions outlined above, I consider three different positions regarding the existence and nature of conflicts between human rights: (1) denial of human rights conflicts; (2) recognition of human rights conflicts; and (3) questioning the rights–interests distinction. It should be clarified at the outset that these three positions are umbrella terms intended to capture broad camps of views. I present only the main features of each position. Within each camp, there are internal disagreements and debates; however, to avoid unnecessary complications, I do not engage with differences that are not relevant to the present purpose.

Position (1)- Denying Human Rights Conflicts:

Commentators who hold this view regard the human rights of all as a harmonious order in which human rights of different holders cannot conflict with one another. They tend to treat human rights as functioning like rules (rather than principles). In a particular situation, if there are two apparently conflicting rights claims, they are understood as conflicting rules, such that one of them must be invalid. That is, when two human rights appear to conflict in a concrete situation, the specific content and scope of each asserted right must be carefully determined in that context. It can then be clarified which one right, rather than the other, is applicable.¹⁴

Such commentators may share similar conceptions or foundations of rights, as well as corresponding implications for the human rights system. First, they tend to embrace a Kantian ideal according to which each person's freedom forms part of an integrated system of 'equal freedom for all', and this system of rights cannot be internally inconsistent.¹⁵ Second, in order to avoid conflicts, they may recognise only a relatively limited list of human rights. Moreover, they

¹⁴ Stijn Smet, *On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights*, 17 HUM. RIGHTS LAW REV. 499, 503–504 (2017).

¹⁵ E.g., James Griffin, *When Human Rights Conflict*, in ON HUMAN RIGHTS 57, 58–59 (James Griffin ed., 2008); HILLEL STEINER, AN ESSAY ON RIGHTS 80 (1994).



are likely to recognise only negative human rights (and the corresponding negative obligations),¹⁶ because negative obligations of non-interference cannot conflict with one another.¹⁷

Position (2)- Recognising Human Rights Conflicts:

This group of commentators believes that conflicts between human rights are unavoidable. To the extent that there exist irreconcilable human rights obligations that cannot be satisfied simultaneously, human rights can conflict. For instance, the landmark case *Evans v. the United Kingdom* concerned UK regulations requiring the consent of both parties for an embryo to be preserved and used. The applicant wished to preserve and use the embryo created with J, while J withdrew his consent to the preservation of the embryo. The wishes of both parties were protected under Article 8 of the European Convention on Human Rights (ECHR). As these rights were irreconcilable, the case presented a genuine dilemma involving conflicting human rights held by two individuals.

Under this view, (relative) human rights function as principles.¹⁸ They are *pro tanto* rights but can be outweighed by more pressing considerations. Hence, when different human rights give rise to contradictory obligations, a careful decision must be made as to which normative demand should prevail. Therefore, unlike Position (1), this view does not consider contradictions between human rights to be an inconsistency within the human rights system.

Nonetheless, human rights conflicts are not a welcome phenomenon, because they entail that at least one right must be compromised. As Lorenzo Zucca puts it, ‘Whichever way you look at it, you are going to lose something fundamental’.¹⁹ There is always a moral cost to compromising rights; accordingly, in some cases we may further expect appropriate forms of alternative compensation to be adopted in order to ease such moral costs.

Position (3)- Questioning the Rights–Interests Distinction:

Like Position (2), this view recognises that conflicts between rights may occur. However, commentators who hold this view question whether it makes a significant difference to courts’ approaches to such conflicts whether they are framed as conflicts between rights or as conflicts between interests. This view does not deny that rights and interests often lead to different normative consequences in many human rights systems and in domestic law. Rather, it questions whether courts’ methods of analysing and responding to a conflict should be determined by whether the conflict is considered to exist between rights or between interests.

The jurisprudence of the ECtHR and the Court of Justice of the European Union (CJEU) recognises important interests as rights, especially when a consensus emerges among Member States. For

¹⁶ *E.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 30–33 (1974).

¹⁷ Smet, *supra* note 9 at 512.

¹⁸ *Id.* at 520–21. By contrast with relative rights, Smet suggests that absolute rights function as rules.

¹⁹ Zucca, *supra* note 11 at 20.



example, Article 8 of the ECHR has been extended to include a State's positive obligation to protect individuals against environmental hazards. This gradual expansion of the scope and content of human rights to encompass important interests suggests that conflicts between human rights will become more frequent. However, reframing an issue as a conflict between rights rather than interests does not alter the underlying substantive issues. If the way in which an issue is categorised as a conflict of rights or of interests were to determine the analytical approach adopted, this would lead to doctrinal uncertainty and a lack of transparency. Gerards therefore argues that conflicts should be resolved by reference to substantive considerations—such as the nature of the interests at stake and the seriousness of the interference—rather than by relying solely on the distinction between fundamental rights and personal interests.²⁰

Institutional Suitability for Human Rights Conflicts

Each of the positions outlined above may further entail different perspectives on the most appropriate institutional forums for addressing potential human rights conflicts. Those who adopt **Position (1)** tend to view human rights as rules with an absolute character; apparent conflicts between rights are therefore matters of legal interpretation. Courts are particularly well suited to determine which right genuinely exists and is applicable in a specific context, and which does not.

On the other hand, those who adopt **Position (2)** consider it desirable to minimise the occurrence of human rights conflicts in the first place. Many conflicts can actually be accommodated and harmonised through effective practical measures and policies, such as the equitable distribution of resources or better regulation of the timing and manner in which rights are exercised. In other words, many apparent conflicts of rights may be a consequence of poor resource distribution and management. Even when it is necessary to prioritise some interests or rights over others, the political branches certainly have more diversified tools to set the agenda, present a range of policy options, and seek solutions that protect both sides to the maximum extent possible or are acceptable to as many people as possible.

Contrary to the latitude available to the political branches to pursue practical reconciliation in cases of apparent conflict, courts have limited scope to devise a third way. They typically must rule in favour of one party while rejecting the other's claim: the structure of litigation inevitably forces courts to choose a winner. Judicial proceedings are necessarily narrowly focused, starting from the perspective of the applicant's claim, which inevitably presents other human rights or

²⁰ Janneke Gerards, *Fundamental Rights and Other Interests: Should It Really Make a Difference?*, in *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS* 655, 688–89 (Eva Brems ed., 2008).



important interests with different weights. Courts are thus less capable than the political branches at managing human rights conflicts.²¹

It should be noted that this view does not deny courts' authority to adjudicate cases involving human rights conflicts, nor does it take a position on courts' capacity or role in reviewing economic and social rights or positive obligation cases. Furthermore, it does not concern itself with the broader debate between judicial activism and judicial restraint. Rather, this view serves as a reminder of the political branches' duty to reconcile potential conflicts. It emphasises the need for caution in framing an issue as a stark conflict, in which only a binary choice appears possible.

Finally, **Position (3)** concurs with Position (2) that human rights conflicts do occur. However, it primarily insists that judicial practice (its processes of review, intensity and outcomes) should not be overly influenced by the formalistic distinction between 'human rights' and 'interests'. The core claim is that courts should adopt a consistent and principled approach to all forms of normative stakes, regardless of whether they have acquired the status of rights.

Accordingly, Position (3) may also concur with Position (2) that the political branches bear responsibility for avoiding severe clashes between rights. This responsibility, however, applies equally whether the conflict involves rights or interests. If conflicts do eventually arise—whether between rights, between interests, or between rights and interests—courts' analytical approaches should remain consistent, regardless of the nature of the conflict.

How Philosophical Foundations of Human Rights Affect Appraisal of Human Rights Conflicts: An Interdisciplinary Normative Analysis

One's stance on the above positions regarding conflicts of rights ((1), (2), or (3)) is closely influenced by one's view on the foundations of human rights. That is, the way human rights are justified, and which rights qualify as human rights under a given justification, imply different normative judgments about whether human rights can conflict, and whether and under what conditions such conflicts are problematic.

In the following, I examine five approaches to the foundations of human rights to clarify how philosophical accounts of human rights are connected to Positions (1), (2), and (3), and how they, in turn, affect the appraisal of the potential misuse of HRJs. These approaches are **the agency-based, well-being-based, neo-republican freedom-based, duty-based, and practice-based approaches**. They do not exhaust all possible grounds of human rights. However, for the purposes of this Deliverable, a comprehensive survey of all existing approaches falls outside the

²¹ Eva Berms, *Introduction, in* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 1, 3 (Eva Brems ed., 2008).



scope of study. Instead, these five distinct justifications represent mainstream approaches to grounding human rights, and the diversity of their argumentative structures helps illuminate the connection between the foundations of human rights and the possibility of rights conflicts.

According to their argumentative structure, I categorize these approaches into three camps, **instrumental**, **non-instrumental**, and **legal positivist**, borrowing from Cruft, Liao and Renzo.²² These labels are intended only to indicate different modes of justification for human rights and to map the relationships among theoretical approaches. Nevertheless, considerable diversity exists within each category, and the labels should be understood as primarily heuristic.

This categorization helps clarify that the more human rights are regarded as ends in themselves, the more problematic artificially constructed conflicts of rights appear. Conversely, the more human rights are treated as instruments for achieving other goals—and the broader the range of such goals—the less problematic conflicts between human rights are likely to seem.

Instrumental Justifications of Human Rights: Agency-basis, Well-being-basis, Freedom-basis

Instrumental justifications of human rights hold that human rights exist because they are necessary means for realizing or enhancing particular valuable dimensions of human life. On this view, human rights function as instruments for achieving further, ultimate goals—not just any goals, but those central to essential features of human life. Without human rights, these goals cannot be adequately realised.

There are many arguments about the appropriate goals of human rights. The following discussion considers three examples (agency, well-being (or interests), and republican freedom). Together they represent a relatively wide range of justifications for human rights.

Human Agency

To begin with, a commonly suggested goal for human rights is human agency. James Griffin, for instance, argues that human beings, unlike animals, have a conception of the good life. Humans enjoy dignity when they are able to plan their lives according to their own view of the good life and to realize that vision. Human rights are meant to protect this capacity to be the authors of one's own life—namely, human agency.²³

However, agency is often criticized as too narrow a goal to serve as the foundation of human rights. Prioritizing the human capacity to make choices and moral decisions potentially excludes

²² Rowan Cruft, S. Matthew Liao & Massimo Renzo, *The Philosophical Foundations of Human Rights: An Overview*, in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* 1, 11–23 (Rowan Cruft, S. Matthew Liao, & Massimo Renzo eds., 1 ed. 2015), <https://academic.oup.com/book/10638/chapter/158640141>.

²³ James Griffin, *First Steps in an Account of Human Rights*, in *ON HUMAN RIGHTS* 0 (James Griffin ed., 2008), <https://doi.org/10.1093/acprof:oso/9780199238781.003.0003>.



individuals who are unable to make meaningful choices (such as children) as rights-bearers. Therefore, some commentators seek to ground human rights in accounts of human interests or well-being that do not depend on a conception of human beings as moral agents.²⁴

Well-being

A less conventional example within this vein is the Benthamite approach to human rights. As is well known, Benthamite Utilitarianism aims to maximise pleasure and minimise pain. On this view, human rights are justifiable insofar as their realisation contributes to minimising aggregate pain and maximising aggregate pleasure.²⁵

Contrary to this monistic approach, most commentators within this tradition adopt a pluralist framework. That is, no single ultimate good serves as the goal of human rights. Instead, human rights function as means to a cluster of goods that enable individuals to live well. For instance, James Nickel justifies human rights on the basis of four secure claims: ‘to have a life’, ‘to lead one’s life’, to avoid ‘severely cruel or degrading treatment’, and to avoid ‘severely unfair treatment’.²⁶ Even broader is John Tasioulas’s argument that any interests we possess by virtue of our humanity, which ground duties in others to respect them, can justify human rights.²⁷ The broader the range of interests or dimensions of well-being that are taken to justify human rights, the more extensive the resulting list of human rights is likely to be. James Nickel’s account risks being too narrow, whereas John Tasioulas’s approach is likely to be overly expansive.

Neo-republican Freedom

An emerging approach grounds human rights in their role as institutional necessities for realizing neo-republican freedom. Neo-republicans define freedom as the absence of domination. Lena Halldenius further argues that, for individuals to live free from domination, a social order is required that shields them from exploitation and vulnerability. It also requires a political community in which citizens rule themselves as equals. Human rights are among the institutions that can help concretize such a society—one that prevents domination both among individuals and by the State.²⁸

The neo-republican justification for human rights has two advantages compared to other instrumental approaches. First, it emphasises the internal relationship between equality and

²⁴ Massimo Renzo, *Human Rights and the Priority of the Moral*, 32 SOC. PHILOS. POLICY 127, 146 (2015).

²⁵ Johanna Ohlsson & Johanna Romare, *An Ethical Analysis of Human Rights Justifications*, 6 (2026).

²⁶ NICKEL, *MAKING SENSE OF HUMAN RIGHTS*, 2ND EDITION 62 (2nd edition ed. 2006).

²⁷ John Tasioulas, *On the Foundations of Human Rights*, in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 0* (Rowan Cruft, S. Matthew Liao, & Massimo Renzo eds., 2015), <https://doi.org/10.1093/acprof:oso/9780199688623.003.0002>.

²⁸ Lena Halldenius, *Human Rights and Republicanism*, in *THE OXFORD HANDBOOK OF REPUBLICANISM* (Frank Lovett & Mortimer Sellers eds., 2024), <https://doi.org/10.1093/oxfordhb/9780197754115.013.36>; Ohlsson and Romare, *supra* note 20 at 14–17.



freedom. This is significant because agency-, dignity-, or well-being–based approaches do not provide a sufficient justification for a human right to equality.²⁹ An individual does not need to be treated equally relative to others in order to enjoy the liberty to form a life plan or to attain a minimally decent life. By contrast, for neo-republicanism, equal status is an institutional necessity for preventing domination.

Second, the neo-republican approach highlights the institutional dimension of human rights as the infrastructure of non-domination. I take this aspect to provide a conceptual link that helps bridge the gap between human rights as moral aspirations and human rights as legal instruments.

Non-instrumental justification of Human Rights: Duty-basis

The instrumental approach to justifying human rights, as shown above, is generally consequentialist. However, there are also non-consequentialist approaches to human rights. Most prominently, commentators who adopt a Kantian framework typically justify human rights on a deontological basis. For Kantians, the concept of duty is prior to that of rights. Individuals have reciprocal duties to refrain from treating one another in ways that violate human dignity. Human rights, on this view, denote generalised duties owed by persons to one another.³⁰ In other words, human rights do not concern the fostering of certain interests of people, but rather express the nature of persons. Human beings are the kind of beings whose interests are worthy of protection.³¹ Human rights are expressions of the moral status of human beings. For Katrin Flikschuh, this suggests that human rights are ideas whose existence we must assume, given the kind of beings that we are.³²

Institutional Justification of Human Rights: Practice-basis

Finally, there are also approaches that seek to justify human rights not as moral principles, but mainly as political and legal practices. For instance, Allen Buchanan takes human rights as part of the Rawlsian ‘law of peoples’ and ground them on the international instruments of human rights. In his view, human rights are ‘an institutionalized form of practical reasoning that serves moral values while at the same time managing moral disagreement by constraining the types of reasons and evidence it admits as relevant...’³³ Although Allen Buchanan appears to be confident that international human rights instruments and treaty bodies have established mechanisms to manage moral disagreements, lingering concerns remain. Some question whether international

²⁹ Allen Buchanan, *The Egalitarianism of Human Rights*, 120 ETHICS 679, 696, 700 (2010).

³⁰ Katrin Flikschuh, *Human Rights in Kantian Mode: A Sketch*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 0, 657–660 (Rowan Cruft, S. Matthew Liao, & Massimo Renzo eds., 2015), <https://doi.org/10.1093/acprof:oso/9780199688623.003.0038>.

³¹ F. M. KAMM, INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM 89 (2007), <https://doi.org/10.1093/acprof:oso/9780195189698.001.0001>.

³² Flikschuh, *supra* note 25 at 667.

³³ ALLEN BUCHANAN, THE HEART OF HUMAN RIGHTS 8 (2013), <https://doi.org/10.1093/acprof:oso/9780199325382.001.0001>.



practices, as we know them today, reflect a sufficient moral consensus and whether they can serve as an enduring moral aspiration.³⁴

Foundations of Human Rights and Appraisal of Conflicts

With a range of grounds for human rights in view, we can now assess how these foundations entail different positions on conflicts of human rights. At one end of the spectrum, a Benthamite utilitarian approach clearly supports Position (3), since human rights do not occupy a higher moral status than other interests. Rights are merely one tool among many for maximising utility, and conflicts of rights are simply a version of conflicts of interests. Which rights or interests should prevail depends entirely on the calculation of overall utility.

At the opposite end, Kantian approaches tend to endorse Position (1). When human rights are understood as expressions of the moral status of human beings, conflicts between human rights would imply conflicts within humanity itself or within human moral status. Similar reservations arise in instrumental approaches that tie human rights closely to thick conceptions of humanity (such as autonomy, dignity, or agency). As Rowan Cruft et al. rightly point out, these approaches ‘seem to commit us to the conclusion that anyone whose human rights have been violated is thereby at least likely to fail to possess minimal agency or a minimally decent life or a life worthy of dignity’.³⁵ If human rights were to conflict inevitably, this would imply that human dignity is necessarily compromised. Accordingly, the exercise of human rights should be harmonised rather than set in conflict.³⁶

It is also worth noting that Kantian approaches tend to justify a relatively short list of human rights—primarily negative rights. This helps explain why they can maintain that human rights do not conflict, since negative rights are less likely to generate direct conflicts. A similar point applies to instrumental approaches that rely on thick conceptions of humanity and recognize narrower ultimate goals, thereby yielding shorter lists of human rights.

Finally, Allen Buchanan’s institutional approach and Lena Halldenius’s neo-republican approach both occupy a middle ground (Position (2)), albeit for different reasons. The institutional approach takes existing international human rights practices and institutions as its benchmark. It therefore necessarily acknowledges the existence of conflicts among human rights, since legal practice itself recognises and attempts to accommodate such conflicts.

³⁴ Victor Tadros, *Rights and Security for Human Rights Sceptics*, in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 0* (Rowan Cruft, S. Matthew Liao, & Massimo Renzo eds., 2015), <https://doi.org/10.1093/acprof:oso/9780199688623.003.0025>.

³⁵ Cruft, Matthew Liao, and Renzo, *supra* note 17 at 16.

³⁶ JAMES GRIFFIN, *ON HUMAN RIGHTS* 63 (2008), <https://doi.org/10.1093/acprof:oso/9780199238781.001.0001>.



The neo-republican approach, by contrast, cannot endorse Position (3), because rights are not reducible to mere interests for neo-republicans.³⁷ At the same time, it is not inherently opposed to conflicts of rights, as Position (1) is, since interference with one's liberty or rights does not necessarily constitute domination; only arbitrary interference that leads to domination does so. Moreover, the neo-republican framework anticipates the possibility of conflicts, given its commitment to a more extensive list of human rights and to positive duties on the part of the political community to prevent vulnerability to domination. When confronted with rights conflicts, the neo-republican tradition emphasises the role of democratic participation and civic virtue in reconciling competing rights. This tendency not to overemphasise the role of the judiciary in resolving rights conflicts also aligns with Position (2).

In short, the foundations of human rights are closely connected to how conflicts among them are appraised. This appraisal, in turn, provides further resources for explaining (as discussed below) why abuses of HRJs—manifested in artificially constructed or “inflated” conflicts of human rights—are problematic.

‘Inflated HRJs’ under the Three Positions

Let us now consider the normative assessment of HRJs under each of the approaches to human rights conflicts outlined above. Under **Position (1)** (denial of human rights conflicts), if the government defends its policies by invoking human rights in a manner that gives rise to apparent human rights conflicts, this implies that one of the competing human rights claims must be invalid. It may be that the government is advancing an incorrect rights-based argument, in the sense that its invocation of the right is mistaken. Alternatively, the government may be seeking to challenge, or even to invalidate, the countervailing rights claims raised by applicants, thereby denying them the status of right-holders in the specific context.

While in any human rights dispute the government necessarily refuses to honour particular individual claims of right, it is under Position (1) that HRJs would involve an especially strong posture of total negation of countervailing human rights claims. Accordingly, the government should invoke HRJs with prudence. Position (1) would regard the government's purely programmatic, or insincere, use of HRJ rhetoric as leading to the proliferation of spurious conflicts. It further suggests a potentially malicious attempt to disqualify counter-claims of rights as non-existent, thereby violating the assumption that the State should enforce the human rights system as a whole in good faith.

With respect to **Position (3)** (which downplays the distinction between rights and interests), contrived HRJs suggest that the government is seeking to take advantage of rights-based language by upgrading a policy interest into a right. The government may attempt to rely on certain

³⁷ Philip Pettit, *Rights, Constraints and Trumps*, 47 ANALYSIS 8 (1987); Philip Pettit, *The Consequentialist Can Recognise Rights*, 38 PHILOS. Q. 1950- 42, 45–46 (1988).



rights as a shorthand in order to reduce its burden of explaining and justifying policy choices. It may also seek to influence the judiciary (see below) or political debate. Whatever the intention, Position (3) disfavour HRJs that result in ad hoc, inconsistent, opaque, or even arbitrary decision-making.

Finally, **Position (2)** recognises that human rights conflicts do occur, and that they are likely to arise more frequently as catalogues of human rights expand and positive obligations grow. However, like Position (3), it generally regards it as undesirable for governments to cloak policy choices in the language of rights in ways that generate inflated or inauthentic human rights conflicts. Moreover, Position (2) emphasises the responsibility of the political branches to take due care to avoid unnecessary clashes between human rights.

Accordingly, inflated HRJs may be understood as a symptom of the political branches' negligence in fulfilling their duty to realise the equal enjoyment of human rights for all to the fullest extent possible, using all available means. Where human rights conflicts arise from a failure to prevent conflicts that could have been avoided and are ultimately brought before the courts, the judiciary is confronted with a premature issue—one that it is not institutionally best placed to address. (This is not to deny the existence of genuine human rights conflicts arising from well-planned and properly implemented human rights systems. In such circumstances, the government's use of HRJs is hardly problematic, and the courts should indeed step in as the final adjudicators.)

Although I have identified when and why HRJs becomes problematic under Positions (1) and (3), HRJs do not pose unexpected challenges for liberal democratic human rights institutions from the perspectives of Positions (1) and (3). Provided that courts function properly, even where HRJs lead to apparent human rights conflicts, these positions do not regard such conflicts as institutionally troubling. This is because Position (1) treats the resolution of apparent human rights conflicts (whether caused by HRJs or otherwise) as a central and suitable judicial task, while Position (3) does not accord special weight to rights in resolving conflicts, if any arise.

Nonetheless, Position (2) finds HRJs and the accompanying human rights conflicts more challenging. On the one hand, Position (2) acknowledges that human rights claims carry special normative force, as opposed to mere policy or interest-based arguments. It also recognises the moral costs when human rights are outweighed by other considerations, whether other rights or other kinds of interests. However, HRJs, if insincere or inflated, take advantage of the normative weight of human rights discourse to serve the policy goals of the political branches. Position (2) therefore requires closer attention to methods for resolving conflicts in accordance with the ideal of equal enjoyment of human rights for all. It also draws attention to obstacles that allow HRJs to evade proper judicial review.

Position (2): The Approach Adopted by this Deliverable on Behalf of this Project

In this paper, I take Position (2) as my normative anchor for assessing HRJs, as it is closest to the practices of international and regional human rights systems and therefore has strong practical



implications. Position (1) would require a short and strictly negative list of rights to be realised, which does not align with contemporary human rights developments, while Position (3) does not fit the prevalent distinction drawn between conflicts and interests. (Of course, the prevalence of this distinction is precisely what gives Position (3) its value: it reminds us how formalistic distinctions can easily be taken advantage of.)

The Rights–Interests Distinction: Institutional Dimensions

Since this paper (following Position (2)) recognises the distinction between rights discourse and policy discussions, it is useful to further consider the incentives the government may have to ‘elevate’ a conflict involving public or individual interests into a conflict of rights, or to ‘downgrade’ a conflict of rights into a conflict of interests. This exercise will enhance our sensitivity to the possible misuse of HRJs, particularly where there are clear incentives for the government to frame an issue in a particular way. The impact of such framing depends heavily on institutional design and may vary from one jurisdiction to another. Nevertheless, we can map out the possible angles to take into account.

Let us begin by considering the institutional differences that may arise when applicants are able to articulate their claims in the language of human rights rather than as mere interests. The use of rights-based language may affect how a case fares in the following ways:

- Rights-based language may affect jurisdiction; for example, the ECtHR has jurisdiction only over cases involving human rights, so applicants must frame their claims as rights violations.
- Rights-based language may affect courts’ choice of the standard of review; for example, non-arbitrariness review may be applied to cases affecting interests, proportionality review to cases affecting rights, and hierarchical review to cases involving absolute rights.
- Rights-based language may affect the allocation of the burden of proof; for example, whether the applicant must show that the government acted unreasonably, or whether the government must justify the suitability and necessity of its decision.
- Rights-based language may affect the intensity of review; for example, even where proportionality review is formally applied regardless of whether rights or interests are at stake, the review may be conducted in a particularly deferential manner in cases involving only interests.
- Rights-based language may affect courts’ views of their own institutional competence; for example, courts are traditionally regarded as well suited to interpreting rights, but less well suited to adjudicating policy choices concerning the allocation of interests.

Now, when the government (as a respondent) also invokes human rights to justify its actions or inactions, we can likewise consider how the above dimensions may be affected. For example, Swedish courts, as current legal interpretation stands, cannot review alleged human rights



violations that have already been addressed by Parliament;³⁸ therefore, if legislation is justified on the basis of Parliament's interpretation and resolution of human rights disputes, this may hollow out courts' authority to review the human rights issues at stake. In other words, framing a conflict or policy choice in the language of rights or of interests can affect courts' jurisdiction. This may constitute an incentive for the government to frame substantive issues in the language of conflicts of rights. We can further observe other aspects of specific institutional settings, examining whether formulating a conflict in the language of rights leads to different standards of review, reduced intensity of review, greater judicial deference to administrative decisions, or a shifting of the burden of proof to claimants and so on.

Normatively speaking, however, it is far from ideal for the litigating parties' framing of an issue to substantially affect the scope and intensity of judicial control. Judicial authority would then appear contingent on techniques of issue framing and would risk becoming arbitrary. Therefore, at a minimum, courts should enjoy sufficient autonomy and independence in framing issues and in selecting the appropriate level and standard of review, rather than being constrained by the discursive strategies of the litigating parties. When *ex post* review mechanisms and courts' discretion in identifying issues and determining levels of scrutiny are impaired, the risk of abusive HRJs may be heightened. At the same time, courts should maintain consistency in their own approaches to the categorisation and resolution of conflicts, rather than relying on *ad hoc* and inconsistent practices.³⁹

Summary

In this subsection, I consider when and why HRJs are normatively problematic insofar as they give rise to apparent human rights conflicts. The answer depends on one's view of the existence, nature, and appropriate responses to human rights conflicts. More fundamentally, it reflects one's approach to the foundations and functions of human rights, as well as to the respective roles of the political and judicial branches in realising them.

If one holds that human rights cannot conflict, then 'inflated HRJs' may amount to an attempt to invalidate the applicant's countervailing rights claims and to deny her status as a rights-holder. If one is critical of the distinction between rights and interests, then 'inflated HRJs' may be seen as an attempt to exploit this formalistic division, with the risk of producing opaque and inconsistent case outcomes. Finally, if one holds—as I do here—that the framing of human rights conflicts should be approached prudently, and that the compromises of rights under unavoidable conflicts should be explicitly acknowledged, then HRJs may function as a cover-up for failures to realise

³⁸ The Swedish Constitution, The Instrument of Government (RF 11.14:2; RF 12:10:2).

³⁹ Olivier De Schutter & Françoise Tulkens, *Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution*, in *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS* 169, 172–74 (Eva Brems ed., 2008). (Criticising the ECtHR's jurisprudence for its lack of consistency in dealing with potential conflicts between the Article 6 right to a hearing and the right to a trial within a reasonable time under the Convention.)



equal rights for all to the fullest extent possible, and to recognise and fairly distribute the costs associated with the compromise of rights.

The prudential approach to recognising human rights conflicts emphasises the government's duty to avoid such conflicts as far as possible through practical measures. This focus on the political branches' role in actively mitigating competing claims also helps to explain the problematic dimensions of the types of HRJs discussed above. Many examples convey a sense of insincerity: the government appears half-hearted when it invokes human rights to defend its actions or inactions. While it is difficult to establish the government's actual willingness, at least in the Taiwanese context, HRJs can be read as a pretext for reluctance to implement certain human rights, insofar as the government merely invokes apparent conflicts without demonstrating genuine efforts to accommodate competing rights claims. This concern is particularly salient in relation to Types C HRJ, where the just distribution of resources to fulfil rights in the face of competing demands lies at the centre of the controversy.

3.2 Intrapersonal Conflicts

The human rights conflicts discussed in the above section are presumed to be conflicts between the rights of multiple right-holders (interpersonal conflicts). What is contradictory in such cases is the government's human rights obligations owed to each party. Interpersonal conflicts thus have a triangular structure: for example, in *Evans*, the government faced two conflicting obligations owed respectively to Ms Evans and to J, and these obligations could not be reconciled.

However, in Types A and B HRJs, I also identify a special sub-category in which only a single right-holder is involved. In these cases, what are in conflict are two different human rights obligations owed by the government to the same person (intrapersonal conflicts). For instance, one individual's right to a public hearing may conflict with that same individual's right to a timely judgment, insofar as insisting on a public hearing could delay the proceedings. The structure of intrapersonal conflicts is therefore a single vertical relationship between the government and the right-holder.

The foregoing discussion of interpersonal human rights conflicts is also applicable to intrapersonal human rights conflicts. However, intrapersonal conflicts have distinctive features that are not fully captured by that analysis. Most importantly, HRJs leading to intrapersonal rights conflicts tends to carry a strong paternalistic dimension. The government necessarily claims that it knows better than the right-holder which of her rights or interests should be prioritised.

Will Theory of Rights versus Interest Theory of Rights

Can the government plausibly claim that it bears mutually conflicting and irreconcilable obligations towards the same individual when such a claim runs counter to that individual's own wishes regarding her rights? This question touches upon the longstanding debate between the will theory of rights and the interest theory of rights. Put simply, under the will theory of rights,



intrapersonal human rights conflicts should not arise, whereas under the interest theory of rights, such conflicts are possible.⁴⁰

The will theory of rights understands rights as entailing a form of sovereignty, including the power to waive corresponding duties. The government cannot invoke a right-holder's A right to frustrate the same person's B right, because if the B right were genuinely X's right, X should be able to waive it, thereby resolving the alleged rights conflict. In other words, rights cannot be appropriated in a manner that runs counter to the right-holder's will. The interest theory of rights, on the other hand, understands rights as protecting right holders' welfare. As welfare can be objectively defined, detached from the right holder's will, the government thus may possibly argue that it trades the lesser welfare of X for larger welfare.

Intrapersonal Conflicts HRJs as a 'Suspect Category'

However, even under the interest theory of rights, HRJs that give rise to intrapersonal rights conflicts should be treated with strong suspicion, except in cases involving rights that are commonly recognised as non-waivable, such as the right not to be enslaved. This is because intrapersonal conflicts necessarily appear to compromise one of X's rights, often against her will, which runs counter to foundational assumptions of the human rights system—namely, respect for individual liberty and the presumption that individuals are best placed to determine their own priorities.

Moreover, given the strong paternalistic tendency of HRJs that lead to intrapersonal rights conflicts, its abuse is likely to be imposed disproportionately on groups whose capacity to make sound judgments has traditionally been questioned or discounted, such as women, children, minorities, and foreigners. Recall the Taiwanese examples of intrapersonal human rights conflicts of Types A and B (paternalist use of HRJs and neo-liberal use of HRJs): these concern new marriage immigrants (overwhelmingly women in the Taiwanese context), female workers, and foreign caregivers (again, overwhelmingly women). It is plausibly not coincidental that these examples predominantly involve women, particularly migrant or immigrant women.

Underlying concerns about discrimination are often what render this type of HRJs intuitively illegitimate. A comparison between Swedish and Taiwanese cases involving regulations concerning children helps to illustrate this point.

Swedish case: discrimination concern

A paradigmatic example of intrapersonal conflict arises where the government defends strict stop-and-search powers applied to children on the basis of children's best interests. Although

⁴⁰ See generally, George W. Rainbolt, *Rights: Interest and Will Theories*, in *ENCYCLOPEDIA OF THE PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY* 3109 (2023), https://link.springer.com/rwe/10.1007/978-94-007-6519-1_375.



the law is, on the face of it, race-neutral, its implementation may have a disproportionate impact on children with migrant backgrounds.⁴¹

Taiwanese case: no racial discrimination concern

Taiwan prohibits minors from initiating political demonstrations on the ground that such restrictions serve minors' best interests: minors are considered insufficiently mature to bear the legal responsibilities that may follow from acting as organisers.⁴²

While the Taiwanese law is paternalistic, the limitation on minors' participation in political demonstrations does not raise concerns of racial discrimination. By contrast, the Swedish case may amount to indirect racial discrimination if disparities in enforcement can be established.

In short, HRJs that give rise to intrapersonal human rights conflicts should be regarded as a suspect category of HRJs. Such justifications are particularly prone to illiberal outcomes (by overriding right-holders' own assessments of their wellbeing) and to inequality, insofar as they may constitute direct or indirect discrimination.

4. Conclusion

If the government defends a policy in human rights terms, perhaps insincerely or carelessly, what is the problem? After all, should not the government always seek to align its policy with the ideals of human rights?

This Deliverable aims to respond to this puzzle. It clarifies that misuse of HRJs is problematic not necessarily because human rights are used as a tool. Although commentators who adopt a Kantian, duty-based approach to justifying human rights would consider the use of human rights as a tool for other ends necessarily problematic, many others ground human rights in an instrumental approach, supporting them for their usefulness in achieving ultimate goals essential to humanity, such as human agency, well-being, and neo-republican freedom. For the instrumental camp, instrumentalisation alone does not distinguish proper use from misappropriation of human rights terms.

Meanwhile, HRJs are not problematic simply because the government invokes human rights terms half-heartedly. Second-guessing genuine intentions behind a policy is always challenging, and a policy is likely to be supported by multiple intentions. Criticism of insincerity in defending a policy thus often leads to endless political quarrels and does not take us very far.

⁴¹ Maria Grahn-Farley, *The Silent Sound of Drowning*, 51 *Brook. J. Int'l L* (2025) 1-47, at 22-23.

⁴² Nat'l Human Rights Comm'n, *Control Yuan, Int'l Covenant on Children's Rights: List of Issues to Be Taken Up in Connection with the Consideration of the Initial Report of Republic of China (Taiwan): Replies of Republic of China (Taiwan) to the List of Issues 63-64* (2018).



A useful approach to theorising the misuse of HRJs should be independent of the content of the policy and its political context. The research design of this Deliverable therefore begins with collecting cases of HRJs from Taiwan's State reports under UN human rights review processes and breaking down their argumentative structure based on Hohfeld's rights analysis. This process enables a typology of HRJs, on the basis of which a normative appraisal can be further conducted.

The key finding based on the typology is that HRJs are legally intriguing when the government's human rights assertions, used to defend policy, lead to apparent conflicts between negative and positive human rights. They are problematic because they signal heightened institutional barriers to implementing human rights. When the government intentionally frames policy as an unavoidable choice between conflicting rights, while disregarding alternative approaches or framings that would not produce such conflicts, it effectively shirks its responsibility to reconcile competing demands so that each individual's human rights can be realised to the fullest extent possible. HRJs therefore flag instances where the government fails to fulfil its institutional role in realising human rights, instead attempting to evade its obligations by constructing a narrative of conflict. Moreover, the intentional framing of conflicts between positive and negative rights may undermine judicial review, for instance by obscuring standards of review or even blocking the courts' power of review (as in cases such as Sweden). This possibility highlights the importance of identifying the conceptual convenience and institutional advantages a government may gain from 'upgrading' an interest to the status of a right. The impact on judicial review is just one of them.

Most importantly, HRJ's typology exposes a notable phenomenon that is rarely addressed in the existing literature on human rights conflicts: intrapersonal HRJs. This serves as a strong indicator that a marginalised group may be subject to discrimination. When the government defends an infringement on an individual's rights by alleging that it enhances another right of the same person, it not only claims superior knowledge of that individual's well-being but also frames the individual as a beneficiary rather than a victim. This rhetoric risks obscuring the real circumstances of those caught in intrapersonal rights conflicts, preventing their experiences from being fully understood and recognised.

At this juncture, this insight bridges the theoretical framework developed in this Deliverable (D3.2) with Deliverable 7.5 (which comprises 7.5-A and 7.5-B), supported by *the Cross-Deliverable Synthesis Note linking D3.2, D7.5-A, and D7.5-B* (attached as Annex A). This latter document articulates a cycle of knowledge co-production in which D7.5-A and D7.5-B pose questions about how the harms of HRJs are understood from within (D7.5-A) and who may suffer such harms (D7.5-B), while this Deliverable D3.2 provides an analytical framework for responding to the questions raised in D7.5.

Read in reverse, Deliverables D3.2 and D7.5 also constitute the next cycle of knowledge co-production. This Deliverable D3.2 identifies an initial suspicion of intrapersonal HRJs. D7.5-B, through a nuanced account of intersectionality, then reveals the concealed and multifaceted



forms of discrimination experienced by groups subjected to intrapersonal HRJs. Through the lens of intersectionality, it becomes possible to assess whether this initial suspicion is well-founded. D7.5-A further contributes a grassroots method (Rings on Water’) for developing localised knowledge of marginalised people’s circumstances and well-being from their own perspectives, thereby generating a counter-narrative on how their rights should be protected, and challenging governmental paternalistic presumptions. Taken together, intersectional analysis renders more visible the plight of those affected by intrapersonal HRJs. The ‘Rings on Water’ approach, moreover, provides a roadmap for building an alternative narrative—not solely through legal concepts, but through meaningful social engagement.

Human rights lawyers tend to regard it as problematic when the government denies a right by downgrading it to the status of an interest. This project examines the risks of the opposite phenomenon; one that is more subtle and therefore harder to recognise. This Deliverable makes a theoretical breakthrough by demonstrating that, when the government seeks to upgrade an interest, a policy, or a political preference to the status of a right, the resulting problems extend far beyond the ‘inflation’ or ‘watering down’ of rights. Nor are governmental insincerity or the mere institutionalisation of rights necessarily the central issues. Rather, the inappropriate use of human rights terminology signals deeper institutional weaknesses within the human rights system. It indicates a governmental attempt to evade its core duty to uphold human rights by generating avoidable conflicts and undermining judicial review. It may also further obscure the real circumstances of marginalised groups. This Deliverable lays the foundation for probing the institutional impacts of HRJs and calls for deeper exploration across different jurisdictions in the future.



ANNEX A

Co-Production of Knowledge

How D 3.2 and D 7.5 (comprising D 7.5-A, and D 7.5-B) converse to produce a single analytical–methodological contribution

A single co-production cycle

These Deliverables do not sit alongside one another; they form a **single cycle of knowledge co-production** in which each document supplies what the other two presuppose. D 7.5-A provides the *engagement infrastructure* through which Civil Society practitioners and legal researchers enter structured contact. D 7.5-B provides the *reflexive condition* under which that contact can produce intersectional knowledge rather than reimpose the State’s own categories on those affected. D 3.2 provides the *analytical instrument* into which the engagement’s empirical findings are distilled, and which then returns to Civil Society as an advocacy and litigation resource.

Read as a conversation, the three deliverables pose and answer a specific sequence of questions. D 7.5-A asks: *under what methodological conditions can State HRJ practice be read from inside rather than from above?* D 7.5-B answers: only if categories of vulnerability are allowed to surface from engagement itself, rather than being pre-decided by researcher or State. D 3.2, working on the empirical corpus that D 7.5-A’s rings assembled and disciplined by D 7.5-B’s reflexive check, answers the further question: *what classes of HRJs are most prone to the which harm that this corpus exposes?* Its answer — HRJs producing intrapersonal rights conflicts, in the Taiwanese cases of migrant workers’ mobility restrictions, intrusive marriage-migrant interviews, and the invalidated ban on women’s night shifts — is a suspect category identifiable by the legal structure and empirically traceable to the groups whose judgment the State feels most entitled to override.

The bidirectionality is constitutive. D 3.2’s most original move — the suspect-category claim — became possible only because NGO practitioners repeatedly surfaced cases in which



paternalistic State action was justified in the name of the persons being restricted. The theoretical refinement then returned to Civil Society through the method documented in D 7.5-A, such as the Nordic Rule of Law Forum and the Sweden–Taiwan civil-society bridge operationalise the framework transnationally.

The three-way dialogue at a glance

<p>D 7.5-A</p> <p><i>Rings on Water</i></p>	<p>The engagement infrastructure: a staged, concentric methodology in which each workshop is designed to correct the silences of the previous one. Successive rings brought NGO practitioners, frontline workers, and affected communities into structured contact with legal researchers.</p>	<p>A reflexive critique to prevent the design from re-imposing the categories it is meant to surface (supplied by D 7.5-B); and an analytical instrument into which its empirical findings can be distilled (supplied by D 3.2).</p>
<p>D 7.5-B</p> <p><i>Complex Intersectional Critique</i></p>	<p>The reflexive condition: intersectionality in a legal project must be built bottom-up from empirical legal cases, not imposed a priori. The <i>monist-subject</i> critique names the failure mode the other two deliverables must avoid in their own design.</p>	<p>An engagement site structured to let affected subjects become legible as subjects rather than categories (supplied by D 7.5-A); and a doctrinal frame that treats HRJ rhetoric as law rather than as discourse alone (supplied by D 3.2).</p>
<p>D 3.2</p> <p><i>HRJ Theory Paper</i></p>	<p>The analytical instrument: a Hohfeldian typology distinguishing Type A, B, and C HRJs, and identifying <i>intrapersonal-conflict HRJs</i> as a <i>suspect category</i> prone to paternalism and indirect discrimination.</p>	<p>An empirical pattern of cases dense enough to sustain a doctrinal typology (supplied by D 7.5-A engagements with NGOs); and the reflexive warrant for identifying disproportionately</p>



		affected groups bottom-up (supplied by D 7.5-B).

What HRJust’s contribution to inclusive democracy ultimately demonstrates is that rigorous human-rights theory, empirically-grounded intersectional analysis, and effective Civil Society practice are co-constitutive — neither separable as enterprises nor deliverable by any single discipline working alone.



ANNEX B

HRJust Horizon Anthology Proposal submitted to Tobias Ginsberg at CUP

<https://mail.google.com/mail/u/1/?ik=9df4c9937b&view=pt&search...hread-a:r2826198378191204870&simpl=msg-a:r7506032900835022969>

From: Grahn-Farley, Maria, Sun, Apr 26, 2026 at 2:14 PM

To: Tobias Ginsberg tobias.ginsberg@cambridge.org

Dear Tobias,

I hope you are well. Pls. find the already discussed book proposal as attached in this email. The anthology proposal concerns a EU Horizon project called HRJust.

All the best Maria

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